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CASE NO. 86-344

# In The Supreme Court of the United States

OCTOBER TERM, 1986

THE STATE OF OHIO, *et al.*,

*Appellants,*

v.

FLEET AEROSPACE CORPORATION,

*Appellee.*

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ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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## REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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## SUPPLEMENTAL STATEMENT

On September 17, 1986, a certificate was filed with the Secretary of State of Ohio that Fleet Acquisition Corporation, a *wholly-owned subsidiary* of appellee Fleet Aerospace Corporation ("Fleet"), had merged *into* Aeronca, Inc. ("Aeronca"). (Appellee's Motion to Dismiss or Affirm, p. 2) Thus, Aeronca, the Ohio corporation which was the target of the takeover attempt underlying this litigation, is the surviving corporation in the merger and it remains in existence as an Ohio corporation, with the same name, as a wholly-owned subsidiary of Fleet.

Fleet originally commenced its tender offer for Aeronca on May 21, 1986. Aeronca opposed that offer. It was a defendant in the District Court, and filed an appeal in the Court of Appeals on June 11, 1986. On June 13, 1986, however, during the pendency of this case in the Court of Appeals, the managements of Fleet and Aeronca reached an Agreement and Plan of Merger which provided, *inter alia*, for the withdrawal of Aeronca's opposition to Fleet's extended tender offer.

Under the laws of Ohio governing corporate mergers, target company shareholders must vote to approve all proposed mergers, except a merger between a corporation and a shareholder which owns 90% or more of its stock. The latter transaction is known as a "short-form" merger. Ohio Rev. Code §§ 1701.78, 1701.80. The requirements and effect of Ohio's merger statutes are the same as those of the Control Share Acquisition Act challenged here, Ohio Revised Code § 1701.831, in that both require the shareholders to vote upon a proposed transaction resulting in a change in control. Nonetheless, Fleet chose not to challenge either the validity or applicability of Ohio's longstanding merger statutes. Instead, Fleet managed to circumvent the shareholder vote requirement by extending its tender offer repeatedly throughout the summer of 1986 until over 90% of the outstanding shares of Aeronca were ultimately surrendered by the shareholders, thereby enabling Fleet to effect a short-form merger on September 17, 1986.

As a result of its repeated, unilateral extensions, Fleet held its tender offer open for over four months. Ironically, the linchpin of Fleet's attack upon Ohio's Control Share Acquisition Act is the supposed delay which it causes in the tender offer process. If, however, Fleet had complied with Ohio law, it could have completed all steps of its tender offer except purchase of the tendered shares. The shareholder vote on its offer would have been completed within as few as 30 (but no more than 50) days after its offer, well before expiration of the 60-day period during which Aeronca shareholders were precluded by federal law from withdrawing the shares they had tendered to Fleet.

This case thus presents an opportunity to assess the constitutional implications of the brief delay in consummation of a tender offer occasioned by a State law in the context of a transaction in which the offeror has itself unilaterally delayed the tender offer far beyond the period of the challenged State law.

## GROUNDS FOR PLENARY CONSIDERATION

### 1. THIS APPEAL SHOULD BE GIVEN PLENARY REVIEW IN TANDEM WITH NOS. 86-71 AND 86-97, IN WHICH THE COURT HAS NOTED PROBABLE JURISDICTION OVER APPEALS INVOLVING THE CONSTITUTIONALITY OF THE INDIANA CONTROL SHARE ACQUISITION STATUTE.

On October 6, 1986, this Court consolidated and noted probable jurisidiction over two appeals from a judgment of the United States Court of Appeals for the Seventh Circuit holding the Indiana Control Share Acquisition Statute to be unconstitutional: *CTS Corporation v. Dynamics Corporation of America, et al.*, No. 86-71, and *State of Indiana v. Dynamics Corporation of America, et al.*, No. 86-97, 55 U.S.L.W. 3231 (Oct. 6, 1986).

Although the constitutional issues presented in this appeal are similar to those presented in the Indiana cases, there are sufficient differences between the cases to make desirable a consideration of this appeal in tandem with the Indiana appeals, including the following:

1. The District Court below held an evidentiary hearing with respect to the operation and effect of the Ohio statute in the context of a contested tender offer. The record in this case includes an Affidavit from Harold M. Williams, former Chairman of the SEC, concerning the Ohio statute, and live testimony from James M. Tobin, a lawyer who has practiced extensively in the area of tender offers and who participated in the drafting of the Ohio statute. In contrast, the Indiana appeals have no factual record because no evidentiary hearing was held. Brief of Appellant CTS Corporation In Opposition To Motion To Affirm, p. 3, No. 86-71 (filed Sept. 5, 1986). The factual record in this case presents a useful and more traditional basis upon

which to resolve the constitutional issues presented than do the secondary sources, such as law review articles, upon which the lower courts necessarily relied in deciding the Indiana cases.

2. Although the Indiana and Ohio statutes are similar, in many respects there are several distinctions between them:

   (a) Ohio prohibits an acquiring person from making a "control share acquisition" (*i.e.*, buying the shares) without the required shareholder approval; Indiana permits the acquisition to be made but denies the acquiring person the right to vote the acquired shares unless shareholder approval is obtained.

   (b) Indiana authorizes the target to redeem the bidder's shares if the Act is violated; Ohio law contains no redemption provision.

   (c) Indiana permitted the Board of a target corporation to "opt in" to the statute before its effective date; Ohio's statute applies unless the shareholders of a target corporation vote to "opt out" of the statute.

   (d) Indiana requires the bidder to pay the cost of a special shareholders' meeting; Ohio law does not.

   (e) Ohio's law applies to the transfer of shares from one majority holder to another; Indiana's does not.

Consideration by this Court of the validity of both statutes will thus serve to define more clearly the

constitutional limitations upon the States' powers to regulate the internal affairs of the corporations which they create.

3. The Indiana statute was held unconstitutional by the District Court for the Northern District of Illinois, without the certification to the State of Indiana required by 28 U.S.C. § 2403(b). *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250, 259-60 (7th Cir. 1986). Although the State of Indiana objected to the venue of the action after it was finally provided with the statutory notice and intervened at the appellate level, the Court of Appeals held that the venue objection had been "waived." *Id. But compare Leroy v. Great Western United Corp.*, 443 U.S. 173, 186 (1979). Whether the venue problem in the Indiana appeals will ultimately interfere with this Court's consideration of the substantive constitutional issues presented remains to be seen. In contrast, Ohio's appeal presents no such procedural obstacles to a resolution on the merits.

In view of the foregoing, it is respectfully submitted that the Court should note probable jurisdiction of this appeal and set it for argument in tandem with the Indiana appeals, Nos. 86-71 and 86-97.[1]

## 2. THIS APPEAL PRESENTS A JUSTICIABLE CONTROVERSY.

Appellee argues that this appeal is not justiciable because: (1) the State of Ohio has no standing to defend the constitutionality of its statute, and (2) the case is moot. Neither of these arguments has merit.

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[1] *See, e.g., Davidson v. Cannon*, 105 S. Ct. 2673 (1985) (Mem.) (Setting No. 84-6470 for argument in tandem with No. 84-5872); *Dow Chemical Co. v. United States*, 105 S. Ct. 2700 (1985) (Mem.) (Setting No. 84-1259 for argument in tandem with No. 84-1513). *See generally* Stern, Gressman and Shapiro, *Supreme Court Practice* § 14.6 at p. 589 (6th ed. 1986).

### A. The State Has Standing To Pursue This Appeal.

Appellee recognizes that the decisions of this Court[2] establish that (Appellee's Motion to Dismiss or Affirm, p. 11):

> [I]t is the prospect of a binding final judgment of validity or invalidity, with its attendant *res judicata* effect, that creates the risk of injury to a state and forms the basis for a sovereign's standing to defend the validity of its statute.

Appellee argues, however, that the "decision below" is not a final adjudication of the Act's constitutionality, but merely an order preliminarily enjoining the State from enforcing its statute against Fleet "and that the State can litigate the validity of § 1701.831 in the future." (*Id.*, pp. 11-12).

Appellee overlooks the fact that the Court of Appeals, by stipulation of all parties, decided this case on its merits as an appeal from a declaratory judgment by the District Court that § 1701.831 is unconstitutional. The court below said (Appendix to Jurisdictional Statement, p. A-4) (citations omitted):

> The State of Ohio seeks an order of this court setting aside the declaration that the Ohio Control Share Acquisition Act is unconstitutional and appeals from the injunction precluding its enforcement in this case.
>
> At the oral argument counsel for all parties have requested that this court consider the expedited appeal on its merits, not merely the question of the nature, extent, and propriety of injunctive relief heretofore granted by the district court and the questions of staying that action or granting further injunctive relief by this court. The

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[2] *E.g., Maine v. Taylor*, 106 S. Ct. 2440, 2447 (1986); *Diamond v. Charles*, 106 S. Ct. 1697, 1704-05 (1986); *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602 (1982).

> parties have submitted extensive briefs on the injunctive relief issues and on the merits of the constitutionality of the Ohio Control Share Acquisition Act. Counsel addressed fully at oral argument the constitutionality of the Ohio law at issue.
>
> * * *
>
> The constitutional issue is clear. . . . We conclude that the State of Ohio has standing before this court to contest the district court decision that the Ohio statute is unconstitutional on its face and in its application to this dispute.

Thus, the Court of Appeals entered its judgment on the merits, holding § 1701.831 unconstitutional. That judgment by the Court of Appeals is unquestionably binding on the State of Ohio, and its *res judicata* effect will preclude Ohio from attempting to relitigate the constitutionality of the statute in some future proceeding.

The State of Ohio has standing to defend the validity of its statute. Reversal of the Court of Appeals' judgment declaring § 1701.831 to be unconstitutional is the only available relief by which the State can vindicate its interest in upholding the validity of the statute.

Moreover, the State has other important interests at stake in this appeal. One of its corporations, Aeronca, Inc., has been acquired in violation of § 1701.831. Rights created in favor of Aeronca's shareholders by Ohio law have been ignored and infringed; directors have been elected to Aeronca's Board by the vote of shares which were acquired by Fleet in violation of § 1701.831; and Aeronca has been merged into a subsidiary of Fleet through a "short-form" merger which Fleet approved by the vote of its illegally-acquired shares. Fleet argues, with some boldness, that, even if § 1701.831 is found to be constitutional by this Court, no remedy is available to redress Fleet's violations of that statute. As discussed below, Fleet's

assertion is unwarranted. If this Court were to reverse the judgment below and remand the case to the District Court for further proceedings, fully effective relief can be granted.

**B. This Appeal Is Not Moot.**

Appellee suggests that this case has been rendered moot by the transaction by which the target, Aeronca, became a wholly-owned subsidiary of Fleet. (Appellee's Br., pp. 16-20). That suggestion is erroneous.

This appeal has not been mooted by the actions of Fleet and Aeronca in derogation of the Ohio Act. Ohio filed in the District Court a Counterclaim against Fleet premised upon O.R.C. §§ 1701.831 and 1707.042 (an Ohio securities fraud statute) seeking, *inter alia,* rescission of any acts or transactions effected by Fleet in violation of Ohio law. The actions subject to the Counterclaim include the tender offer and resultant merger and election of new Aeronca directors by Fleet. Consistent with general corporation laws which leave such matters for judicial determination under ordinary principles of law, O.R.C. § 1701.831 is silent in respect of remedies that would be available to the State for its violation. Fleet has certainly proffered no authority for the proposition that the State may not rely on O.R.C. § 1701.831 alone to prosecute a case against Fleet for a violation of the statute. In addition, Ohio statutes expressly provide for an action to be brought to "set aside any merger or consolidation on the ground that any section of the Revised Code applicable thereto has not been complied with, . . ." O.R.C. § 1701.82(C). *Cf. C.F. Dreher v. The W.M. Patterson Supply Co.*, 23 O.C.C. (N.S.) 54, 56-57 (Ohio Cir. Ct. 1907) (recognizing suit in equity to cancel shares of stock wrongfully issued by a corporation).

Moreover, Ohio can bring an action challenging the Fleet tender offer and merger under its specific, statutory *quo warranto* powers. The *quo warranto* statutes empower the Ohio courts to remove persons who unlawfully hold corporate

office,[3] to dissolve an offending corporation's charter,[4] or to oust the corporation from the State.[5] Rescission is also a remedy available to the State under *quo warranto*. *Cf. State v. The Hocking Valley Ry. Co.*, 8 Ohio App. 450, 458-59 (1917) (ordering rescission under *quo warranto* statutes in antitrust action).

Fleet's suggestion that Ohio has no viable remedy of rescission because of a perceived difficulty in rescinding the transaction at this point in time is premature at best. There is no evidence of record as to the feasibility or propriety of a rescission remedy. Whether rescission of Fleet's tender offer and merger with Aeronca would be appropriate is a matter best left for the District Court to decide on remand. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 388 (1970) ("... the merger should be set aside only if a court of equity concludes, from all the circumstances, that it would be equitable to do so."). Moreover, authority exists for disgorgement of Aeronca shares by Fleet if the District Court finds that rescission is not appropriate. *E.g., McFadden Holdings, Inc. v. JB Acquisition Corp.*, [Current Service] Fed. Sec. L. Rep. ¶ 92,856, at p. 94,169 (S.D.N.Y. 1986); *General Steel Industries, Inc. v. Walco National Corp.*, Fed. Sec. L. Rep. (CCH) ¶ 98,402, at p. 92,418, *later op.*, 527 F. Supp. 305 (E.D. Mo.), *vacated*, 676 F.2d 704 (8th Cir. 1981).

Finally, although the State of Ohio has not yet instituted criminal proceedings, effecting a tender offer in violation of the Ohio Act may constitute a prohibited manipulative act under O.R.C. § 1707.042, for which O.R.C. § 1707.99 provides criminal penalties. The term "manipulation" is narrowly defined under federal law, *Sante Fe Industries, Inc. v. Green*, 430 U.S. 462, 476-77 (1977), but this Ohio securities statute has not

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[3]O.R.C. § 2733.01(A); *State v. Bibb*, 14 Ohio App. 3d 85, 470 N.E.2d 257, 259-60 (1984); *Hendershot v. Conner*, 48 Ohio App. 2d 335, 357 N.E.2d 386, 388 (1974).

[4]O.R.C. § 2733.20; *State v. West Shore Center*, 31 Ohio St. 2d 192, 287 N.E.2d 803 (1972).

[5]O.R.C. § 2733.20.

yet been construed by Ohio courts. Thus, it remains to be seen whether Fleet could be charged with a violation of § 1707.042.

It is clear that there is a wide range of remedies available to the State to challenge the tender offer and merger accomplished by Fleet in violation of the Ohio Act, ranging from the State's invocation of its *quo warranto* powers to enforcement of Ohio's securities statutes.

Moreover, appellee's assertion that this case is moot is not supported by this Court's decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). In that case, the offeror obtained an injunction against enforcement of Illinois law against its pending offer but subsequently withdrew its offer and announced that it intended not to make a further offer. 457 U.S. at 629-30. In *MITE,* Justice Marshall, joined by Justice Brennan, dissented on the ground that the case was moot, urging that the Court adopt a rule that a Federal injunction against enforcement of a State statute provides complete immunity from *penalties* for violating the statute. 457 U.S. at 655-64.

Justice Marshall made clear, however, that even under his proposed rule, which was not adopted by a majority of the Court, the State would be permitted to seek rescission of transactions effected in violation of the statute (457 U.S. at 661 n.10) (emphasis added):

> It is true that a rescission action would have been predicated on acts that were taken under cover of the preliminary injunction. However, I believe that injunctions should ordinarily be interpreted only as providing permanent protection from *penalties.* The State should be barred from penalizing the offeror for acts that took place during the period the injunction was in effect. However, if a court determines that the State statute is valid, the state should be free to provide a remedy for the continuing effects of acts that violated the statute. *In particular, a State should*

*be permitted to dismantle a successful acquisition that violated a valid statute.*

Even under Justice Marshall's expansive view of the effects of the District Court's preliminary injunction, Ohio has the power to challenge those transactions which appellee has effected in violation of § 1701.831. Moreover, under a less expansive view of the preclusive effect of the preliminary injunction below, such as that advanced by Justice Stevens in *MITE* (457 U.S. at 647-55), appellee could be subjected to criminal liability for violations of Ohio's securities laws. *See* Ohio Rev. Code § 1707.99.

This appeal remains a "live" controversy in which the State of Ohio has the "undoubted standing" and continuing "direct stake"[6] in defending the constitutionality of § 1701.831.

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[6] *Diamond v. Charles*, 106 S. Ct. 1697, 1704, 1705 (1986). *Accord, Maine v. Taylor*, 106 S. Ct. 2440, 2447 (1986)

## CONCLUSION

Probable jurisdiction over this appeal should be noted. This appeal should be set for argument in tandem with the consolidated appeals involving the similar Indiana statute in which the Court has already noted probable jurisdiction: *State of Indiana v. Dynamics Corporation America, et al.*, No. 86-97, and *CTS Corporation v. Dynamics Corporation of America, et al.*, No. 86-71.

Respectfully submitted,

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